UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

AMERICAN WHITEWATER, AMERICAN CANOE ASSOCIATION, GEORGIA CANOEING ASSOCIATION, ATLANTA WHITEWATER CLUB, FOOTHILLS PADDLING CLUB, WESTERN CAROLINA PADDLERS, Joseph C. STUBBS, Kenneth L. STRICKLAND, and Bruce A. HARE, Plaintiffs, v. THOMAS TIDWELL, in his official capacity as Chief of the United States Forest Service; the UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture; ELIZABETH AGPAOA, Regional Forester, Southern Region, United States Forest Service; MONICA J. SCHWALBACH, Acting Forest Supervisor, Francis Marion and Sumter National Forests; MARISUE HILLIARD, Forest Supervisor, National Forests in North Carolina; GEORGE M. BAIN, Forest Supervisor, Chattahoochee-Oconee National Forests; THOMAS VILSACK, in his official capacity as Secretary of the United States Department of Agriculture; the UNITED STATES DEPARTMENT OF AGRICULTURE, Defendants.	Civil Action No. 09-cv-02665-RBH

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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I. INTRODUCTION

Plaintiffs bring the instant action because the United States Department of Agriculture ("USDA"), through the United States Forest Service ("USFS"), has unlawfully infringed on Plaintiffs' federally-protected right to use and enjoy the Chattooga Wild and Scenic River (the "Chattooga") upstream of Highway 28 (the "Headwaters") through hand-powered floating.[1]

As explained in the accompanying Motion, Plaintiffs seek a temporary restraining order because Defendants' actions are causing immediate and irreparable damage to Plaintiffs' right, and because Defendants attempt to prevent Plaintiffs from seeking judicial review of their final agency action by characterizing their final action as being subject to yet another internal appeal process. The USFS established October 16, 2009 as the deadline for filing an administrative appeal of the 2009 Amendment. Plaintiff therefore requires emergency relief from this Court so they do not forfeit or waive any substantive or procedural rights to challenge Defendants' violation of federal law in the appropriate forum.[2]

Defendants' violations are simple:

1. The Wild and Scenic Rivers Act ("WSRA") requires that administering agencies "protect and enhance" the "values" that caused a river to be included in the National Wild and Scenic Rivers System;[3] and

2. Congress specifically identified canoe and kayak recreation on the Headwaters as a value that caused the river to be included in the National Wild and Scenic Rivers System;[4] yet

[1] Plaintiffs use the term "floating" to refer to all types of non-commercial, non-motorized methods of river floating or boating, including kayaking, canoeing and rafting.

[2] If Plaintiffs file an administrative appeal by the USFS-imposed October 16, 2009 deadline, they potentially waive their right to challenge to the impropriety of the entire administrative appeal process before this Court. If Plaintiffs do not file an administrative appeal by October 16, 2009, Plaintiffs risk a subsequent judicial determination that the administrative appeal process is valid and that Plaintiffs are barred from seeking relief because they failed to timely file an administrative appeal. Under either scenario, Plaintiffs continue to suffer irreparable injury.

[3] 16 U.S.C. § 1281.

3. The USFS currently bans all floating on the Headwaters (with one *de minimus* exception).

In addition to violating the WSRA,[5] Defendants' actions violate the Wilderness Act,[6] the Multiple-Use Sustained-Yield Act,[7] the Forest and Rangeland Renewable Resources Planning Act,[8] the National Forest Management Act[9] and its implementing regulations,[10] the Administrative Procedures Act ("APA"),[11] and the National Environmental Policy Act[12] and its implementing regulations.[13] Each of these violations is addressed in the Verified Complaint that was filed contemporaneously with this Memorandum and is incorporated herein. These unlawful actions are causing irreparable damage to Plaintiffs, the members of the Plaintiff organizations, and the floating public.

Defendants replaced one unlawful floating prohibition with another unlawful floating prohibition. In doing so, Defendants acted arbitrarily and capriciously, abused their discretion, and acted not in accordance with the law. Specifically, in contravention of its own findings and governing law, the USFS responded to the USFS Chief's 2005 final administrative decision

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[4] *See, e.g.*, Ex. A, Affidavit of Donald E. Kinser, Ex. 1, USFS, *Chattooga River: Wild and Scenic River Study Report*, 5, 69, 74, 150 (1971) [hereinafter, the "1971 Study"]; S. Rep. No. 93-738, at 3008, 3010 (1973).

[5] 16 U.S.C. § 1271 *et seq.*

[6] 16 U.S.C. § 1131 *et seq.*

[7] 16 U.S.C. § 528 *et seq.*

[8] 16 U.S.C. §§ 1600-14.

[9] 16 U.S.C. § 1600 *et seq.*

[10] 36 C.F.R. 219.1-219.29.

[11] 5 U.S.C. §§ 551-706.

[12] 42 U.S.C. §§ 4321-4370.

[13] 40 C.F.R. 1500-08.

reversing the USFS's 2004 Headwaters floating ban (the "2005 Appeal Decision") by issuing an amendment to its 2004 Revised Land and Resource Management Plan (the "2009 Amendment") that effectively perpetuates the unlawful floating ban. The 2009 Amendment maintains an absolute ban on floating two-thirds of the Headwaters. On the other third, the 2009 Amendment bans floating with the exception of approximately six days per year over three winter months. In addition to being issued by the improper USFS officer and not being based on the required use capacity analysis, the 2009 Amendment remains an unlawful ban on Headwaters floating from which Plaintiffs are entitled to immediate injunctive relief.

Because this action is ripe for judicial review, and because Plaintiffs' claims satisfy the standards for issuing preliminary injunctive relief, and pursuant to Federal Rule of Civil Procedure 65, Plaintiffs respectfully request that this Court grant a Temporary Restraining Order and a Preliminary Injunction that: (1) finds that the 2009 Amendment is Defendants' final administrative action in this matter and that Plaintiffs' claims are ripe for judicial review; (2) enjoins Defendants from enforcing any of their Headwaters floating prohibitions, including the most recent Amendments to the Revised Land and Resource Management Plans for each of the Sumter, Nantahala, and Chattahoochee National Forests; and (3) orders Defendants to withdraw or remove any portions of the Revised Land and Resource Management Plans for each of the Sumter, Nantahala, and Chattahoochee National Forests that implement a ban of any kind on floating the Chattooga.

II. FACTUAL BACKGROUND

A. The Chattooga is a Statutory Wild and Scenic River.

The Chattooga is a spectacular natural waterway[14] originating in western North Carolina and flowing south to form the border of northwestern South Carolina and northeastern Georgia. The navigable waters of the Chattooga run through the Nantahala, Chattahoochee, and Sumter National Forests before eventually cascading into Georgia's Tugaloo Reservoir. People have been floating the Chattooga for more than 250 years.[15] Only the Headwaters, those remote and northernmost twenty-two floatable river miles of the Chattooga above the Highway 28 bridge,[16] are at issue in this case. Steep cliffs make many parts of the Headwaters corridor, particularly in the Ellicott Rock Wilderness, accessible only by boat.[17]

In 1974 the entire Chattooga River was designated by Congress as a Wild and Scenic River[18] based upon a 1971 Study[19] conducted by the USFS. The 1971 Study found that the Headwaters (and downstream sections of the Chattooga) should be included by Congress in the National Wild and Scenic Rivers System based in large part on the Chattooga's rare and

[14] The Chattooga's unspoiled beauty provided the backdrop of the infamous movie *Deliverance*. *See, e.g.*, Ex. A, Kinser Aff., Ex. 2, Carol Townsend, *Chattooga! A Case Study of Wild and Scenic River Management Problems* (April 23, 1980).

[15] In 2004, archeologists unearthed a 250-year-old, thirty-two-foot pirogue canoe from the Chattooga's banks. *See* Ex. A, Kinser Aff. ¶ 13, Ex. 8.

[16] *See* Ex. A, Kinser Aff. ¶ 3; Ex. B, Declaration of Kevin Colburn, Ex. 1, USFS, *Environmental Assessment: Managing Recreation Uses on the Upper Chattooga River*, 26 (Aug. 2009) [hereinafter, the "2009 EA"] (providing mileage for four Headwaters segments, totaling 21.8 miles).

[17] S. Rep. No. 93-738 at 3008; 1971 Study 73-74.

[18] *See* 16 U.S.C. § 1274(a)(10).

[19] *See* 1971 Study; Ex. A, Kinser Aff. ¶ 6.

outstanding opportunities for floating.[20] Because floating is one of the values for which Congress protected the Chattooga under the WSRA, the WSRA requires Defendants to protect and enhance that specific value on the Headwaters.[21]

In its 1971 Study, the USFS described the River as follows:

> The Chattooga River . . . is one of the few mountain rivers in the four-state area of North Carolina, South Carolina, Georgia and Tennessee without substantial commercial, agricultural or residential development along its shores . . . . a visitor to this river is instantly transported into the midst of an unspoiled whitewater river environment . . . . The beauty of the rapids and scenery of the Chattooga drainage is unsurpassed in the Southeastern United States.[22]

The USFS recommended that Congress include all sections of the Chattooga in the National Wild and Scenic Rivers System, based in large part on the Chattooga's outstanding opportunities for recreational floating:

> Floating activities which include rafting, canoeing, and kayaking are very compatible uses for the river because these activities can capitalize on whitewater and scenic qualities that it possesses. By the nature of the activity, little damage, in comparison to other compatible uses will be anticipated on the very fragile riverbanks.[23]

The Headwaters' importance to floaters stems from the remoteness of the river corridor; the quality and diversity of the whitewater; the beauty of the rock formations, flora, fauna and free-flowing clean water; and the sheer magnitude of the wilderness experience they offer. The river

[20] 1971 Study 69-76.

[21] S. Rep. No. 93-738; Pub. L. No. 93-279.

[22] 1971 Study 3.

[23] 1971 Study 150.

thus provides floaters unique opportunities for river adventure, scientific and nature study, bird watching, photography, fishing, and other floating-related activities.

Part of what makes the Chattooga so worthy of Wild and Scenic protection is the opportunity to float fifty-seven consecutive river miles (including the Headwaters) of a remote Wild and Scenic river, a portion of which flows through a wilderness, in the eastern United States. There are less than a handful of opportunities to float long, continuous Class I-V whitewater in the entire United States, and the Chattooga is the *only* multi-day opportunity in the Southeast.[24] Completely or effectively banning floating on almost forty percent of the river eviscerates this important aspect of the Chattooga's protection.

In addition to the rest of the Chattooga, the 1971 Study specifically recommended the *Headwaters* for inclusion in the Wild and Scenic River system because of their outstanding primitive floating opportunities:

> [Portions of the Headwaters] can be floated only in rubber rafts . . . *Rafting or some method of floating is the best way to see this rugged portion of the river*. Many of the pools and canyon-enclosed sections are 10-20 feet deep and impossible to wade by hikers and fishermen. The sheer rock cliffs and dense vegetation on the steep ridge sides make hiking extremely difficult.[25]

It is also telling that the USFS proposed to Congress a map of the Headwaters that labeled the start of the Headwaters as the "beginning of rafting water" and proposed "launch sites" for floating the Headwaters.[26] Based on the 1971 Study, Congress in 1974 included the Chattooga

[24] Ex. A, Kinser Aff. ¶ 10.

[25] 1971 Study 73-74 (emphasis added).

[26] 1971 Study 158, 163.

among the first rivers protected as a Wild and Scenic River. Legislative history establishes that Congress intended to protect floating on the Headwaters:

> [On the northernmost portion of the Headwaters] access is available . . . for floaters seeking an exciting experience on this stretch of the river. [The southern portion of the Headwaters], which is crossed by only two narrow bridges, has been virtually unchanged by man. It includes some beautiful, but hazardous, whitewater . . . . In a short span of 1½ miles, the fast moving waters drop over 16 cascades and rapids, before reaching one of the most difficult portions of the river where, for 8 miles, it splashes around huge rocks, through narrow sluices, over numerous waterfalls and rapids, and through a Rock Gorge where house-size boulders further constrict the already narrow channel through which floaters must pass. While rafting this segment is difficult, it is about the only way to see this portion of the river since rugged terrain makes access for hikers almost impossible.
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> Naturally, such a stream is most attractive to whitewater enthusiasts of all kinds and the river is becoming very popular in this regard. While much of it can be successfully negotiated by raft, canoe, or kayak, the shallow water and numerous rocks preclude the use of motorized boats.[27]

Pursuant to the WSRA, Defendants were placed in charge of managing the Chattooga in compliance with the statute. Both before and after the Chattooga was designated a Wild and Scenic River, and prior to the illegal closure of the Headwaters in 1976, members of the Plaintiff organizations, including Plaintiffs Joseph C. Stubbs, Kenneth L. Strickland, and Bruce A. Hare, floated the Headwaters in order to enjoy their many uses.[28]

B. The USFS Has Instituted Unlawful Floating Bans on the Headwaters.

In 1976, despite Congress' intent to protect floating on the Chattooga, Defendants, without benefit of any study or public input, and through the mechanism of the 1976 Chattooga

[27] S. Rep. No. 93-738 at 3008, 3010.

[28] *See* Ex. C, Affidavit of Joseph C. Stubbs 1; Ex. D, Affidavit of Kenneth L. Strickland 1; Ex. E, Affidavit of Bruce A. Hare 1.

Wild & Scenic River Classifications, Boundaries and Development Plan (the "1976 Plan") instituted a complete prohibition against floating the Headwaters.[29] In 1985, again without benefit of any study or data, the USFS continued that illegal ban.[30] During this entire period, the public continued to float the Headwaters as they had for over 250 years because the "on-paper" USFS floating ban was neither posted nor enforced. When floaters learned of the prohibition, they immediately challenged it. Therefore, in 2003, for the first time since the 1971 Study, the USFS agreed to analyze why floating the Headwaters, a protected activity under the WSRA, had been banned. Regrettably, the USFS failed to properly analyze the Headwaters floating issue, and instead published a cursory decision in its January, 2004 RLRMP that perpetuated the illegal ban.[31] In April 2004, Plaintiff American Whitewater ("AW") filed an administrative appeal of the 2004 ban, and was successful with that appeal. The USFS Chief agreed with AW in his 2005 Appeal Decision:

> After careful review of the record . . . I am reversing the Regional Forester's 2004 Decision to continue to exclude boating on the Chattooga [Headwaters]. I find the Regional Forester does not provide an adequate basis for continuing the ban on boating above Highway 28. Because the record provided to me does not contain the evidence to continue the boating ban, his decision is not consistent with the direction in Section 10(a) of the WSRA or Sections 2(a) and 4(b) of the Wilderness Act or agency regulations implementing these Acts.[32]

[29] Ex. A, Kinser Aff. ¶¶ 8-9, Ex. 3.

[30] *Id.* at ¶ 9, Ex. 4.

[31] Ex. A, Kinser Aff., Ex. 10, USFS, *Record of Decision: Final Envtl. Impact Statement/Revised Land and Res. Mgmt. Plan*, 13 (Jan. 2004).

[32] *Id.* at Ex. 7, USFS, *Decision for Appeal of the Sumter Nat'l Forest Land and Res. Mgmt. Plan Revision*, 4 (April 28, 2005) [hereinafter, the "2005 Appeal Decision"].

In the same document in which the Chief reversed the 2004 Headwaters floating ban, however, he reinstated the 1985 Headwaters floating ban in place of the invalidated 2004 ban.[33] While the 1985 ban remained in place, the Chief directed the Regional Forester to conduct a "visitor use capacity analysis, *including non-commercial boat use*," and to amend the RLRMP in accordance with those results.[34] Importantly, the Chief, in his 2005 Appeal Decision, expressly cited the USFS regulations that would permit the Regional Forester to lift the floating ban during the visitor use capacity analysis.[35]

It became immediately apparent that the USFS intended to ignore not only the Chief's directives, but also Plaintiffs' federally-protected right to float the Headwaters. First, the USFS ignored the Chief's apparent intent that the Regional Forester permit floating on the river in order to conduct the appropriate user capacity analysis.[36] Instead, the USFS maintained a ban on Headwaters floating, permitting only twelve hand-picked floaters access to the headwaters on only two days during the 4.5 years after the 2005 Appeal Decision. As a result, no user capacity analysis was ever conducted, even though one is required by the WSRA. Second, the USFS's purported execution of the Chief's 2005 Appeal Decision was undertaken by three local forest managers (the Forest Supervisors) rather than by the Regional Forester. This deviation from the Chief's order is significant because of the Forest Supervisors' intimacy with a small but

[33] 2005 Appeal Decision 5.

[34] *Id.* (emphasis added).

[35] *See id.* (". . . 36 CFR 261.77 provides the Regional Forester with the authority to permit boating on sections of the river that are currently closed.").

[36] *See id.*

influential anti-floating interest, and the Forest Supervisors' demonstrated propensity to ignore federal law and USFS policy regarding Headwaters floating.

Because AW succeeded in its appeal, but Plaintiffs nonetheless remained barred from floating the Headwaters, Plaintiffs, assisted by *pro bono* counsel based in Atlanta, requested that the United States District Court for the Northern District of Georgia require the USFS to permit floating during the required user capacity analysis.[37] The court dismissed Plaintiffs' case at that time on the grounds that the case was not ripe for judicial review, but repeatedly noted that the case would be ripe once the USFS issued its Amendment.[38]

On August 25, 2009, in contravention of the USFS Chief's directives, three Forest Supervisors, not the Regional Forester, issued the 2009 Amendment, based on an incomplete study that does not meet the legal requirements for a user capacity study.[39] The 2009 Amendment also purports to provide "all potential users with a fair and equitable chance to obtain access to the river,"[40] but the suggestion that the 2009 Amendment provides "fair and equitable" access has no factual basis. Notably, the 2009 Amendment limits floating access to only seven of the nearly twenty-two miles of Headwaters (those seven miles remain separated from the lower Chattooga), for only three months of the year (during the winter), at only

[37] *See* Compl., 2:06-cv-74-WCO (N.D. Ga. May 18, 2006) [Doc. 1]; *see also* Pl.'s Mot. for Prelim. Inj., 2:06-cv-74-WCO (N.D. Ga. May 18, 2006) [Doc. 3].

[38] *See American Whitewater v. Bosworth*, No. 2:06-CV-74-WCO, *12-13, 18, 20 (N.D. Ga. Oct. 6, 2006) [Doc. 23].

[39] *See* Ex. F, Declaration of Glenn E. Haas 1-2.

[40] Ex. B, Colburn Decl., Ex. 2, USFS, *Decision Notice and Finding of No Significant Impact for Amendment #1 to the Sumter National Forest Revised Land and Resource Management Plan: Managing Recreation Uses on the Upper Chattooga River*, 4 (Aug. 25, 2009) [hereinafter, the "2009 Amendment"].

exceptionally high water levels.[41] Meanwhile, the 2009 Amendment permits unrestricted access and use for all non-floaters.[42] By the USFS's own estimation, this "fair and equitable access" would result in between zero and eleven, with an average of six, days per year when floaters could actually float less than one-third of the Headwaters, compared to 365 days of access for all other users on the entire length of the Headwaters.[43]

For the reasons set forth below, Plaintiffs request that the Court immediately restore Plaintiffs', and the public's, right to float the Headwaters that existed for over 250 years before the USFS wrongfully and illegally extinguished that right. Such relief would bring the Chattooga's management in-line with that of all other USFS-maintained rivers in the United States.[44]

III. ARGUMENT AND AUTHORITY

A. This Case is Ripe for Judicial Review.

This action pertains to Defendants' violations of the previously identified statutes and Defendants' unlawful administrative actions, and is now ripe for judicial review by this Court. Under the APA, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to

[41] 2009 Amendment 2.

[42] 2009 Amendment 2.

[43] 2009 EA 24.

[44] Of the tens of thousands of river miles in the United States, the Headwaters represent the only miles where floating is banned on a Wild and Scenic River. Default management of the Headwaters does not include floating-access limitations because the natural water flow acts as a self-regulating mechanism by which the river is ideal for some uses, such as fishing, hiking, and swimming, when water levels are lower, and floating when the water levels are higher. *See* Ex. B, Colburn Decl. 41.

judicial review thereof."[45] A federal court may review any "final agency action for which there is no other adequate remedy in a court.[46] On its review, "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."[47]

Because Plaintiffs are suffering a legal wrong because of Defendants' agency actions, and are also adversely affected or aggrieved by these agency actions within the meaning of the APA, Plaintiffs are entitled to judicial review. Further, this case is ripe for judicial review because the USFS's 2009 Amendment is the culmination of the USDA's final administrative action following AW's appeal of the 2004 RLRMP. Therefore, this Court should review Defendants' agency actions and set them aside as arbitrary, capricious, an abuse of discretion, and not in accordance with law.

1. Defendants Have Issued their Final Administrative Decision on this Matter.

The USFS issued its RLRMP on January 15, 2004, continuing the USFS's unlawful ban on Headwaters floating. Plaintiff AW exercised its administrative remedy and appealed that decision. Following AW's appeal, the USFS Chief issued his Decision for Appeal reversing the RLRMP as "the final administrative determination of the Department of Agriculture . . . ."[48] As part of that "final administrative determination," the Regional Forester was to conduct a use analysis study and adjust or amend the RLRMP as appropriate.[49] The 2009 Amendment issued pursuant to the 2005 Appeal Decision is therefore the culmination of the USDA's final

[45] 5 U.S.C. § 702.

[46] 5 U.S.C. § 704.

[47] 5 U.S.C. §706(2)(A).

administrative determination, and Plaintiffs have consequently exhausted their administrative remedies, making this case ripe for federal judicial review.

The finality of the 2009 Amendment is supported by the Northern District of Georgia's decision to dismiss AW's plea for injunctive relief in 2006. The court expressly and repeatedly stated that the 2009 Amendment would represent Defendants' final administrative action and would be ripe for judicial review, assuring that: "[w]hether that amended plan renews or lifts the floating ban, *the question of floating on the Headwaters will be definitively resolved by final agency action and subject to judicial review at that more appropriate time*;"[50] that "*if plaintiffs find the amended 2004 plan unacceptable*, they can challenge that plan, and *if judicial review is needed, it will be available . . .* ;"[51] and that "[i]f [Plaintiffs'] vision ["of an open Headwaters"] does not materialize, *they can be assured that the courts will be open and willing to review their complaints at that time*." [52]

The court also indicated that even Defendants acknowledged that the 2009 Amendment would be their final agency action regarding the Headwaters boating ban, stating that: "Defendants point out that the agency has not yet made a final decision regarding whether floating on the Headwaters will be prohibited by the amended 2004 plan and argue that any decision prior to *that ultimate one* should not be considered final agency action."[53] Therefore, by

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[48] 2005 Appeal Decision 5.

[49] *Id.*

[50] *American Whitewater*, No. 2:06-CV-74-WCO at *12-13 [Doc. 23].

[51] *Id.* at *18.

[52] *Id.* at *20.

[53] *Id.* at *12 (emphasis added).

Defendants' own admission, the 2009 Amendment is the "ultimate" decision and should be considered their "final agency action."

Because the 2009 Amendment is Defendants' final administrative action regarding the Headwaters floating ban, Plaintiffs have exhausted their administrative remedies and this Court should grant judicial review of this matter.

2. Even if the 2005 Appeal Decision Is Not the Final Administrative Decision, this Case Is Nonetheless Ripe for Judicial Review.

Even though Defendants attempt to characterize the 2009 Amendment as subject to further administrative appeal, and not their final administrative action, this matter is nonetheless ripe for judicial review. The United States Supreme Court recognizes that the "[d]octrines of 'ripeness' and 'exhaustion' contain exceptions" that "permit early review when, for example, the legal question is 'fit' for resolution and delay means hardship, or when exhaustion would prove 'futile.'"[54] "A case is fit for judicial decision where the issues to be considered are purely legal ones and where the agency rule or action giving rise to the controversy is final and not dependent upon future uncertainties or intervening agency rulings."[55] Further, "[i]n considering whether a dispute is ripe for review, the court must look to three factors: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented."[56] As shown below, all three of these factors weigh in

[54] *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13, 120 S.Ct. 1084, 1093 (2000) (internal citations omitted).

[55] *West Virginia Highlands Conservancy, Inc. v. Babbitt*, 161 F.3d 797, 800 (4th Cir. 1998).

[56] *S.C. Wildlife Fed'n v. S.C. Dep't of Transp.*, 485 F. Supp. 2d 661, 671 (D.S.C. 2007).

favor of judicial review. Moreover, further resort to the administrative appeals process would be futile.

a. The Legal Questions Presented in this Case Are Fit for Resolution and Delay Means Hardship.

(i) Requiring Further Administrative Appeal Would Cause Delay and Hardship on Plaintiffs.

The USFS has been unlawfully banning floating on the Headwaters since 1976. When the USFS chose to continue this unlawful ban in 2004, Plaintiff AW patiently participated in the USFS administrative appeals process, which took over 5.5 years, during which the USFS ignored or missed every single statutory and published procedural deadline. To require Plaintiffs to once more resort to the administrative appeals process would do nothing more than cause another extensive delay in restoring Plaintiffs' rights when they have already been through the entire administrative process on this matter. The natural Plaintiffs are in or are nearing their sixties, and another delay of any length of time could effectively impose on them a lifelong Headwaters floating ban.[57] Plaintiffs should not be forced to endure a decade-long appeals process when they have already exhausted a 5.5 year appeals process, the factual record is fully developed, and there is nothing left to decide but legal issues for which Defendants' expertise is unnecessary.[58]

(ii) Judicial Review Would Not Inappropriately Interfere with Further Administrative Action.

In *S.C. Wildlife Fed'n v. S.C. Dep't of Transp.*, this Court found that judicial intervention was "unlikely to 'inappropriately interfere' with further administrative action," when "the

[57] *See* Ex. C, Stubbs Aff. 2; Ex. D, Strickland Aff. 2; Ex. E, Hare Aff. 2.

[58] *See, e.g., Stouffer Foods Corp. v. Dole*, No. 7:89-2149-3, 1990 WL 58502, *2 (D.S.C. Jan. 23, 1990) ("the legal issues of statutory and constitutional construction raised by this suit are not within the area of expertise of defendant's agency, and this is a factor militating against application of the exhaustion doctrine.").

primary policy-setting documents ha[d] already been produced," and the defendants had already decided to build the controversial highway.[59] Similarly, the administrative process in this case has run its course, and there is no further administrative action with which to interfere. The USFS has already issued a RLRMP, reversed that decision, and issued an amended RLRMP in response to the reversal. Further, Defendants have already decided to continue their unlawful ban on Headwaters floating. Therefore, like in *S.C. Wildlife Fed'n*, this Court's review would not inappropriately interfere with further USDA or USFS action.

(iii) The Court Would Not Benefit from Further Factual Development.

The facts of this case are fully developed, thus the Court would not benefit from further factual development. This Court, in *S.C. Wildlife Fed'n*, found that the issues in that case were "adequately presentable to enable the court to conduct a thorough and adequate review of the agencies' actions" in part because "the [Final Environmental Impact Statement] is not some abstract, complicated plan rife with mere potentialities such that the court would have to engage in abstract disagreements over administrative policies."[60] Likewise, here, the USFS Chief issued his 2005 Appeal Decision, and the USFS responded by issuing its 2009 Amendment, supported by its Environmental Assessment (the "2009 EA"). These decisions and the 2009 EA are not abstract, but constitute a complete, concrete, and final factual record for the Court to review. Further factual development, were it even possible, would not benefit the Court in its review. Because the legal questions in this case are "fit" for resolution and delay in reviewing those questions would impose great hardship on Plaintiffs, this case is ripe for federal judicial review.

[59] 485 F. Supp. 2d 661, 671 (D.S.C. 2007).

[60] *Id.* (internal quotations omitted).

b. Requiring Further Administrative Appeal Would Be Futile.

In addition to being fit for resolution, this case meets the second exception to the ripeness and exhaustion of administrative remedies doctrines because resort to further administrative appeals in this matter would be futile. Nothing makes this point more soundly than Plaintiffs' prior experience in administratively appealing this very matter. Despite the Congressional intent and statutory mandate that floating be permitted on the Headwaters, and the USFS's own determination that there was no adequate basis for continuing the Headwaters floating ban, the USFS has shown that it will steadfastly refuse to allow floaters any meaningful access to the Headwaters.[61] In *Stouffer Foods Corp. v. Dole*, where this Court found that requiring the plaintiff to exhaust its administrative remedies would be futile because it did "not appear likely to the court that the defendant would find . . . her own regulations invalid . . . ."[62] It has become equally apparent that the USFS will not find its own Headwaters floating ban invalid or unlawful, even when the agency's Chief has so held. This is especially so considering the USFS's efforts to ensure that any appeal of the 2009 Amendment would be decided by the same office that promulgated the 2004 RLRMP. Specifically, the USFS Chief mandated that the *Regional Forester* conduct the user capacity analysis and amend the RLRMP as necessary, yet the 2009 Amendment was issued by three *Forest Supervisors*, one level lower than the Regional Forester. This improper shifting of responsibilities was apparently calculated so that any appeal would be decided by the same office that originally issued the improper 2004 RLRMP, instead of

[61] The 2005 Appeal Decision, despite "reversing" the Headwaters floating ban contained in the 2004 RLRMP, imposed the floating ban in effect from 1985. Likewise, the 2009 Amendment, responding to the Chief's RLRMP reversal did nothing more than establish illusory Headwaters access, but in effect continued the unlawful Headwaters floating ban in near entirety.

[62] *Dole*, 1990 WL 58502 at *2.

the USFS Chief who held that RLRMP to be invalid. Because requiring Plaintiffs to return to Defendants' administrative appeal merry-go-round would be a futile exercise, this Court should exercise its discretion to review this case.

B. Plaintiffs Are Entitled to Preliminary Injunctive Relief.

Because this case is ripe for judicial review by this Court, the Court may grant Plaintiffs preliminary injunctive relief. To obtain a preliminary injunction, a plaintiff must show: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest."[63] "The standard for granting a TRO or a preliminary injunction is the same."[64] All four elements are present in this case, and this Court should issue a temporary restraining order and a preliminary injunction.[65]

1. Plaintiffs Have a Substantial Likelihood of Success on the Merits.

Defendants' management of the Chattooga is governed, *inter alia*, by the WSRA, which Congress enacted in 1968 so that rivers with "outstandingly remarkable scenic, recreational . . .

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[63] *Uhlig, LLC v. Shirley*, No. 6:08-1208-HFF-WMC, 2009 WL 2997087, *1 (D.S.C. Sept. 17, 2009) (J. Floyd) (quoting *The Real Truth About Obama, Inc. v. Fed. Election Com'n*, 575 F.3d 342, 346 (4th Cir. 2009) (quoting *Winter v. Natural Ress. Def. Council, Inc.*, --- U.S. ----, ----, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008))).

[64] *Field v. McMaster*, No. 6:09-1949-HMH-BHH, 2009 WL 3152036, *1 (D.S.C. Sept. 24, 2009) (J. Herlong).

[65] Moreover, federal courts have routinely entered preliminary injunctions to require the USFS to comply with applicable law pending a final resolution on the merits. *See, e.g., Sierra Club v. Martin*, 71 F. Supp. 2d 1268 (N.D. Ga. 1996) (issuing a preliminary injunction against the USFS to stop a timber sale in the Chattahoochee and Oconee National Forests); *accord, Idaho Sporting Congress v. Alexander*, 222 F.3d 562 (9th Cir. 2000) (issuing a preliminary injunction to stop timber sales in Payette National Forest due to an environmental statute violation); *Stupak-Thrall v. Glickman*, 988 F. Supp. 1055 (W.D. Mich. 1997) (issuing a preliminary injunction to prevent the USFS from prohibiting riparian landowners from boating on water in protected wilderness); *Pac. Rivers Council and Wilderness Soc'y v. Thomas*, 873 F. Supp. 365 (D. Idaho 1995) (enjoining the USFS from logging, grazing, mining, and road building activities); *Sierra Club v. Espy*, 822 F. Supp. 356 (E.D. Tex. 1993) (issuing a preliminary injunction against certain logging procedures); *Sierra Club v. Lying*, 694 F. Supp. 1260 (E.D. Tex. 1988) (enjoining the USFS from timber management activities).

or other similar values . . . [would] be preserved in a free-flowing condition, and . . . be protected for the benefit and enjoyment of future generations."[66] Through the WSRA, Congress instructed Defendants to manage Wild and Scenic Rivers such as the Chattooga according to the following guiding principle:

> Each component of the National Wild and Scenic Rivers System shall be administered in such manner as *to protect and enhance the values which caused it to be included in said system* without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values.[67]

Because floating is one of the values for which the Chattooga was designated Wild and Scenic, the WSRA requires Defendants to protect and enhance this use. Defendants' Headwaters floating ban directly violates Congress's mandate under the WSRA. Plaintiffs, therefore, are substantially likely to prevail on the merits of their claims that Defendants' Headwaters floating prohibition is arbitrary and capricious, an abuse of discretion, and not in accordance with law.

a. Defendants' 2009 Amendment Violates their Mandate under the WSRA to Protect and Enhance Floating as a Value Causing the Chattooga to Be Included in the Wild and Scenic Rivers System.

Congress based its inclusion of the Chattooga in the National Wild and Scenic River System on the USFS's 1971 Study, which repeatedly recognized floating as one of the Chattooga's remarkable values warranting WSRA protection.[68] For example, the 1971 Study recommended Wild and Scenic River status for the Chattooga in order to preserve:

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[66] 16 U.S.C. § 1271.

[67] 16 U.S.C. § 1281(a) (emphasis added).

[68] *See* Ex. A, Kinser Aff., ¶ 6, Ex. 1.

> a river with sufficient volume and flow to allow full enjoyment of river-related recreation activities. These activities like . . . *whitewater canoeing* . . . will enhance the recreation opportunities for many people in an area where river-oriented recreation is scarce; [and] a river capable of supplying many intangible values. These values are difficult to assess *but certainly exist for the canoeist* as he meets the challenge of the river . . . .[69]

Further, the 1971 Study mentioned that "*floating activities which include rafting, canoeing, and kayaking are very compatible uses* for the river because these activities can capitalize on whitewater and scenic qualities that it possesses."[70] With specific reference to the Headwaters, the 1971 Study stated that "*Rafting or some method of floating* is the best way to see this rugged portion of the river."[71] Floating was a value that caused the Chattooga, including the Headwaters, to be designated Wild and Scenic,[72] and the USFS Chief acknowledged this: "*Whitewater boating (canoeing and rafting) is specifically recognized as one of the recreational opportunities available in this generally remote river setting.*"[73]

Because floating is one of the Headwaters' "outstandingly remarkable values" ("ORV"), the WSRA mandates that Defendants "protect and enhance" such floating.[74] In direct violation of this mandate, Defendants have done precisely the opposite by instituting a nearly complete prohibition on floating the Headwaters. This ban falls far outside Defendants' "discretion" to

[69] 1971 Study 66-67 (emphasis added).

[70] 1971 Study 150 (emphasis added).

[71] 1971 Study 74 (emphasis added).

[72] *See generally*, 1971 Study.

[73] 2005 Appeals Decision 5.

[74] 16 U.S.C. § 1281.

determine how best to protect and enhance floating on the river, as it eviscerates the value it is required to protect.

b. Defendants' 2009 Amendment Violates their Mandate under the WSRA, and the USFS Chief's Directive, because it Is Not Based on an Appropriate Visitor Use Capacity Analysis.

Because the 2004 RLRMP was not based on any user capacity study, the USFS Chief directed that the Regional Forester conduct one. Instead, three Forest Supervisors conducted an Environmental Assessment, which did not include a legally-adequate user capacity study and therefore violates not only the USFS Chief's directive, but the WSRA.[75]

Under the WSRA, the USFS is required to promulgate a management plan that addresses user capacities:

> For rivers designated on or after January 1, 1986, the Federal agency charged with the administration of each component of the National Wild and Scenic Rivers System shall prepare a comprehensive management plan for such river segment to provide for the protection of the river values. The plan shall address resource protection, development of lands and facilities, *user capacities*, and other management practices necessary or desirable to achieve the purposes of this chapter. The plan shall be coordinated with and may be incorporated into resource management planning for affected adjacent Federal lands. The plan shall be prepared, after consultation with State and local governments and the interested public within 3 full fiscal years after the date of designation. Notice of the completion and availability of such plans shall be published in the Federal Register.
>
> For rivers designated before January 1, 1986, all boundaries, classifications, and plans shall be reviewed for conformity within

[75] *See, e.g.*, Ex. F, Haas Decl. 1-2.

> the requirements of this subsection within 10 years through regular agency planning processes.[76]

The 2009 EA is simply not a valid or adequate user capacity analysis, as demonstrated by the administrative guidelines interpreting the WSRA. For instance, the *National Wild and Scenic Rivers System; Final Revised Guidelines for Eligibility, Classification and Management of River Areas* (the "Secretarial Guidelines") addressed the nature of user carrying capacity.[77] The Secretarial Guidelines define "carrying capacity" as "[t]he *quantity* of recreation use which an area can sustain without adverse impact on the [ORVs] and freeflowing character of the river area, the quality of recreation experience, and public health and safety,"[78] and further state that:

> Studies will be made during preparation of the management plan and periodically thereafter to determine the *quantity and mixture* of recreation and other public use *which can be permitted* without adverse impact on the resource values of the river area. Management of the river area can then be planned accordingly.[79]

Moreover, the Ninth Circuit found that:

> The Secretarial Guidelines also require that a component's [river's] management plan state the *kinds and amounts* of public use which the river area can sustain without impact to the values for which it was designated[,] and specific management measures which will be used to implement the management objectives for each of the various river segments and protect esthetic, scenic, historic, archeologic and scientific features.[80]

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[76] 16 U.S.C. § 1274(d) (emphasis added). The Chattooga was designated a Wild and Scenic River before 1986, therefore, the USFS was statutorily required to prepare this same management plan, including user capacities, by 1996 at the latest.

[77] *See* 47 Fed. Reg. 39,454 (Sept. 7, 1982).

[78] *Id.* at 39,455 (emphasis added).

[79] *Id.* at 39,459 (emphasis added).

[80] *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1028 (9th Cir. 2008) (emphasis in original) (citing 47 Fed. Reg. at 39,458).

Further, an expert in natural resource planning and policy found that the 2009 EA "fails the test of adequacy on several fronts," and is "virtually silent on the issue of visitor capacity," such that "the USFS is in violation of federal law, is contradicting its very own practices on other wild and scenic rivers, and violates the principles and practices of the recreation resource planning profession."[81]

This failure to conduct an "appropriate user capacity analysis," as directed by the USFS Chief in his 2005 Appeal Decision, and in contravention of the WSRA, shows that Defendants' actions in promulgating their 2009 Amendment were arbitrary and capricious and not in accordance with law, and that Defendants abused their discretion.

c. Defendants' 2009 Amendment Violates their Mandate under the WSRA because Floating Does Not Substantially Interfere with Other Values.

Further, under the WSRA, Defendants are tasked with limiting only those river-oriented activities that "substantially interfere" with a Wild and Scenic River's remarkable values.[82] Defendants' Headwaters floating ban contravenes this command for two reasons. First, a value cannot substantially interfere with itself. Because floating is one of the Chattooga's ORVs, floating cannot logically interfere with the Chattooga's ORVs. Second, Defendants have produced no evidence that floating "substantially interferes" with any other ORVs.[83] The USFS Chief admitted as much in the 2005 Decision:

[81] *See* Ex. F, Haas Decl. 1, 3.

[82] *See* 16 U.S.C. § 1281(a).

[83] *See Riverhawks v. Zepeda*, 228 F. Supp. 2d 1173 (D. Or. 2002) (refusing to ban high levels of motorized boat use on a Wild and Scenic River where there was insufficient evidence that the motorized boats "in fact substantially interfere with the river's outstandingly remarkable values.").

> The [USFS] record, however, is deficient in substantiating the need to continue the ban on boating to protect recreation as an ORV or to protect the wilderness resource . . . . While there are multiple references in the record to resource impacts and decreasing solitude, these concerns apply to all users and do not provide the basis for excluding boaters without any limits on other users.[84]

Likewise, nothing in the 2009 Amendment or its supporting documents provides such evidence. Because Defendants are currently violating Congress' mandate to them under the WSRA, Plaintiffs are likely to prevail on the merits of their claims.

2. Plaintiffs Will Continue to Suffer Immediate and Irreparable Harm if the Court Does Not Grant Preliminary Injunctive Relief.

Not only are Plaintiffs likely to succeed on the merits of their case, but they are currently suffering irreparable harm, which is defined as "an injury for which a monetary award cannot be adequate compensation."[85] Further, "[t]he question of irreparable injury does not focus on the significance of the injury, but rather whether the injury, irrespective of its gravity, is *irreparable*—that is, whether there is any adequate remedy at law for the injury in question."[86]

In *Sierra Club v. Martin*, the court considered the deaths of migratory birds caused by logging permitted by the USFS, and found irreparable injury because: "once the migratory birds are killed, they cannot be returned. More importantly, no monetary award can recompense Plaintiffs for the birds' deaths. Thus, there is no adequate remedy at law for Plaintiffs' injuries."[87] The plaintiffs in *Martin* could have enjoyed the same type of migratory birds in other forests, or the same type of migratory birds in that forest, years later, yet the court found that the

[84] 2005 Appeal Decision 5.

[85] *Randolph v. Jeffery*, No. 2:08-3492-MBS-RSC, 2009 WL 2947366, *2 (D.S.C. Sept. 14, 2009).

[86] *Martin*, 933 F. Supp. at 1571 (emphasis in original).

[87] *Id.*

injury was irreparable because those particular birds would be killed at that particular time. Other courts have also held that administrative action creating an inability to view or experience nature is an irreparable harm warranting preliminary relief, and have rejected the argument that individuals can simply go elsewhere for such an experience.[88]

Similarly, here, Plaintiffs are irreparably harmed by their exclusion from a spectacular natural resource that was protected by Congress expressly for the type of use they wish to enjoy. Plaintiffs' injuries are irreparable because once Plaintiffs have lost time floating the Headwaters as Congress intended, that lost time on the water cannot be returned. This is true despite the fact that Plaintiffs could enjoy floating other rivers. No monetary award can compensate Plaintiffs for this lost time on the water, therefore Plaintiffs have no adequate remedy at law, and their injuries are irreparable.

Specifically with respect to the temporary restraining order, though Defendants have already issued the final administrative decision in this matter, the USFS nonetheless set an October 16, 2009 deadline to file an administrative appeal of the 2009 Amendment.[89] Plaintiffs therefore need emergency relief to avoid waiving substantive and procedural rights to challenge the illegal floating ban, as well as to avoid further irreparable injury.

3. The Ongoing Injury to Plaintiffs Outweighs Any Harm to Defendants.

The ongoing injury to Plaintiffs far outweighs any harm preliminary injunctive relief may inflict on Defendants. As described above, Plaintiffs will continue to suffer irreparable harm

[88] *See Fund for Animals v. Espy*, 814 F. Supp. 142, 151 (D.D.C. 1993) (enjoining the capture of bison near Yellowstone National Park where doing so would reduce opportunities to view bison); *Humane Soc'y of the U.S. v. Glickman*, No. 98-1950, mem. op., *21-22 (D.D.C. June 23, 1998) (enjoining a goose round-up that would reduce opportunities to view geese).

[89] *See* 2009 Amendment 11.

should this Court deny their motion. Defendants, on the other hand, stand to suffer no demonstrable harm if preliminary injunctive relief issues.[90] This lack of harm to Defendants is evident considering that no other river under USFS management is burdened by a floating ban like the one burdening the Headwaters. Thus, by enjoining the present ban, the Court would simply make the Headwaters' management consistent with that of every other USFS-managed river and consistent with the over-250-year history of floating the Chattooga.[91] Furthermore, the lack of harm is demonstrated by the Chief's decision that indicated that a decision by the Regional Forester to immediately reinstate floating would be allowable under the Forest Service regulations.

Defendants have yet to put forth any evidence showing that restoring floating access on the Headwaters would cause any harm not already inflicted by the other permitted uses. Further, the practical effects on Defendants of restoring Headwaters floating access are minimal, merely involving the posting of safety and private property advisories and other minimal signage. Finally, any other "harm" that Defendants may allege is purely speculative because they have never performed a user capacity analysis.

[90] *See Jackson v. Nat'l Football League*, 802 F. Supp. 226, 232 (D. Minn. 1992) (holding that a party has "no justifiable interest in . . . preserving an illegal status quo").

[91] It is also noteworthy that during the two days of permitted Headwaters floating in 2007, there were no accidents nor injuries, no advere resource impacts, no user conflicts, no trespasses, nor any other problems of any kind. When natural and historical river management was restored, floating and other resource uses harmoniously co-existed.

4. Injunctive Relief is in the Public's Interest.

Finally, injunctive relief serves the public interest where it furthers the expressed purpose of a statute.[92] In designating the Chattooga a Wild and Scenic River, Congress found that one ORV of the Chattooga is wilderness floating recreation, providing the USFS a mandate to protect and enhance floating on the river. An injunction compelling Defendants to comply with the WSRA and other applicable federal law is solidly in the public's interest.

Because Plaintiffs are likely to succeed on the merits; Plaintiffs are currently suffering irreparable harm; the ongoing injury to Plaintiffs outweighs any harm preliminary injunctive relief may cause Defendants; and such relief is in the public's interest; this Court should issue the requested temporary restraining order and preliminary injunction.

C. No Bond Should Be Required.

An applicant for preliminary injunctive relief must post security "in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."[93] However, "[t]he amount of security required is a matter for the discretion of the trial court; it may elect to require no security at all."[94] Where non-profit organizations seek enforcement of environmentally-related laws, federal courts have recognized that a nominal bond is sufficient.[95]

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[92] *See Johnson v. USDA*, 734 F.2d 774, 788 (11th Cir. 1984) ("Congressional intent and statutory purpose can be taken as a statement of public interest."); *Citizen's Alert Regarding Env't v. U.S. Dep't of Justice*, No. 95-1702 (GK), 1995 WL 748246, *11 (D.D.C. Dec. 8, 1995) (citations omitted) ("Undoubtedly, there is a strong public interest in meticulous compliance with the law by public officials . . . .").

[93] Fed. R. Civ. P. 65(c).

[94] *Corrigan Dispatch Co. v. Casa Guzman, S.A.*, 569 F.2d 300, 303 (5th Cir. 1978).

[95] *See West Virginia Highlands Conservancy, Inc. v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971) (noting that "the district judge determined that Conservancy need post only a $100 bond to protect sufficiently both defendants."); *State of Alabama* ex rel. *Baxley v. Corps of Eng'rs*, 411 F. Supp. 1261, 1276 (N.D. Ala. 1976) ("This

Here, it would be a hardship for the public-interest Plaintiffs, represented by *pro bono* counsel, to post security.[96] Additionally, the Court should not require bond because Plaintiffs are acting as "private Attorneys General" to enforce federal environmental laws, and security is not required when a government plaintiff brings a similar action.[97] Finally, no bond is necessary because Defendants stand to suffer no loss if this Court grants preliminary injunctive relief.

IV. CONCLUSION

Defendants' continued prohibition on floating the Headwaters, including their most recent ban providing illusory access to the middle-third of the Headwaters and banning access to the rest, while permitting unlimited higher-impact uses, is arbitrary and capricious, an abuse of discretion, and not in accordance with law. The 2009 Amendment directly violates the Congressional mandate under the WSRA to protect and enhance floating on the Headwaters. Plaintiffs have shown that this case is ripe for judicial review. Plaintiffs have also shown that that they are likely to succeed on the merits, that they will continue to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in Plaintiffs' favor, and that preliminary injunctive relief is in the public interest.

For these reasons, Plaintiffs respectfully request that this Court grant a Temporary Restraining Order and a Preliminary Injunction that: (1) finds that the 2009 Amendment is Defendants' final administrative action in this matter and that Plaintiffs' claims are ripe for

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court is simply unwilling to close the courthouse door in public interest litigation by imposing a burdensome security requirement on plaintiffs who otherwise have standing to review governmental action."); *see also Natural Ress. Defense Council, Inc. v. Morton*, 337 F. Supp. 167, 168-69 (D.D.C. 1971) (holding a $100 bond appropriate because a substantial bond would effectually preclude judicial review); *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972) (affirming entry of preliminary injunction preventing construction of a highway project without bond).

[96] *See, e.g.*, *California v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985) *amended*, 775 F.2d 998 (9th Cir. 1985).

[97] Fed. R. Civ. P. 65(c).

judicial review; (2) enjoins Defendants from enforcing any of their Headwaters floating prohibitions, including the most recent Amendments to the Revised Land and Resource Management Plans for each of the Sumter, Nantahala, and Chattahoochee National Forests; and (3) orders Defendants to withdraw or remove any portions of the Revised Land and Resource Management Plans for each of the Sumter, Nantahala, and Chattahoochee National Forests that implement a ban of any kind on floating the Chattooga.

Respectfully submitted,

October 14, 2009;
Greenville, South Carolina

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/s/ J. Nathan Galbreath

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CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Memorandum of Law in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction was served on all parties, pursuant to Fed. R. Civ. P. 5(b)(2)(B), today, October 14, 2009.

/s/ J. Nathan Galbreath
J. Nathan Galbreath